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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY THOMAS,

Defendant and Appellant.

A121924

**(Solano County
Super. Ct. No. FCR250054,
FCR238780)**

Timothy Thomas (appellant) entered a bank with a companion and attempted to cash two checks drawn on two separate accounts, neither of which had adequate funds. He was tried before a jury and convicted of felony counts of second degree burglary and uttering a check with insufficient funds. (Pen. Code, §§ 459, 476a.)¹ The court found true a prior prison term allegation under section 667.5, subdivision (b), and appellant was placed on felony probation subject to a condition of residential drug treatment. The court also revoked and reinstated appellant's probation in a previous case.

Appellant contends his convictions must be reversed because the jury was not instructed that a person uttering a check lacks the intent to defraud if that person believes

¹ Further statutory references are to the Penal Code.

sufficient funds will be in the account when the check is presented for payment. Because the evidence did not support such an instruction, we affirm.

BACKGROUND

Appellant and Lola Burt entered a Washington Mutual Bank in Fairfield and attempted to cash two checks, one for \$600 and one for \$650. Both checks were written to Chris Thomas, appellant's brother, who had a Washington Mutual account. One check was written on Burt's checking account and the other was written on an account held by a Deron Harrison.

The teller was suspicious because the signatures on the two checks appeared to have been written by the same person and because earlier that day, she had received an interoffice e-mail message with an attached photograph warning of possible fraudulent activity by people she recognized as appellant and Burt. She offered to deposit the two checks instead of cashing them, explaining that the checks would have to be placed on hold until they could be verified. The teller informed her supervisor and called the police. Officers arrived at the bank and took appellant and Burt into custody.

At the police station, appellant agreed to speak to officers after being read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. He initially denied knowing Burt, but later admitted that he did know her and that she had contacted him earlier in the day to get his help in cashing a check. Appellant decided to use his brother's bank account since he did not have an account of his own. He admitted that he had entered the bank intending to cash the checks made out to his brother, even though he knew there were no funds in the accounts on which they were written. Appellant had been to three bank branches that day attempting to cash the checks, but he lacked the proper identification to do so and finally decided to deposit them instead. He was supposed to get some money in return for helping Burt.

Burt's bank account, on which one of the checks had been written, had been closed for two weeks and had a zero balance.

DISCUSSION

Section 476a penalizes the utterance of a check with insufficient funds and the intent to defraud. (*People v. Pugh* (2002) 104 Cal.App.4th 66, 73.) Appellant asked the court to instruct the jury that he lacked the necessary intent to defraud if he reasonably believed sufficient funds would be in the account when the check was presented for payment. We disagree that the trial court erred when it refused the requested instruction.

The trial court gave CALCRIM No. 1970 defining the elements necessary to prove a violation of section 476a: “The defendant is charged in Count 2 with using or attempting to use a check knowing that there were insufficient funds for payment of the check. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully used or attempted to use a check for the payment of money; [¶] 2. The defendant acted for himself or as an agent or representative of someone else; [¶] 3. When the defendant used or attempted to use the check, there were insufficient funds in the bank or depository to cover full payment of the check and all other outstanding checks on that account; [¶] 4. The defendant knew that there were insufficient funds available in that account; [¶] AND [¶] 5. When the defendant used or attempted to use the check, he intended to defraud.”² The additional language proposed by appellant was contained in an optional paragraph of that standard instruction and would have advised the jury: “Even if the defendant used or attempted to use a check knowing that there were insufficient funds for payment of the check, the defendant did not intend to defraud if, at the time he acted, he reasonably and actually believed that the check would be paid by the bank or depository when presented for payment. [¶] The

² The court did not instruct the jury that the value of the checks had to exceed \$200, the amount that was then necessary for the offense to constitute a felony. (Former § 476a, subd. (b); CALJIC No. 1971 (2008); see Stats. 2009-2010 3d Ex. Sess., ch. 28, § 13, effective January 25, 2010 [increasing amount to \$450].) There was no dispute that each of the checks in question exceeded \$200, and appellant does not argue that the omission of such an instruction requires reversal or modification of the section 476a count. (See *People v. Ortiz* (2002) 101 Cal.App.4th 410, 416 [“[I]f no rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt and the conviction stands”].)

People have the burden of proving beyond a reasonable doubt that the defendant intended to defraud. If the People have not met this burden, you must find the defendant not guilty of this crime.” (See CALCRIM No. 1970.)

A defendant is generally entitled to a requested instruction that pinpoints the defense theory of the case or relates the reasonable doubt standard to particular elements of the charged crime. (*People v. Burney* (2009) 47 Cal.4th 203, 246; *People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) The court is required to give such an instruction only when it is supported by substantial evidence, i.e., by evidence sufficient for a reasonable jury to find in favor of the defendant on the issue presented. (*Ponce*, at p. 1386; *People v. Salas* (2006) 37 Cal.4th 967, 982.)

The version of CALCRIM No. 1970 that was given by the trial court adequately advised the jury that appellant could not be guilty of violating section 476a unless he intended to defraud Washington Mutual when he uttered the checks. The proposed additional language would have been appropriate only if substantial evidence supported a determination that appellant lacked a fraudulent intent by virtue of his reasonable belief that the checks would be paid when presented for payment by Washington Mutual. Appellant did not testify at trial, but he told the police during his interrogation that he knew there were no funds in the accounts on which the checks were written. He said nothing to qualify this statement or to suggest he had any reasonable basis for believing the checks might nonetheless be covered when they were submitted for payment. There was no evidence, for example, that appellant or Burt intended to deposit additional funds into Burt’s account so that the check written on that account would be honored. (See *Pugh, supra*, 104 Cal.App.4th at pp. 73-74.) Nor was there any evidence presented that Burt had a credit arrangement with her bank to cover overdrafts on her checking account; to the contrary, the only evidence presented on that subject showed that Burt’s account had a zero balance and had been closed. (See *People v. Morrison* (1979) 92 Cal.App.3d 787, 792; *People v. Martin* (1962) 208 Cal.App.2d 867, 873-874.)

Had the jurors disregarded the arresting officer's testimony concerning appellant's out-of-court statements during his interview, they might conceivably have concluded that the evidence was inadequate to show that he knew there was no money in the two accounts.³ In that event, under the version of CALCRIM No. 1970 that was given, they would have acquitted him based on a lack of an intent to defraud. But there was no evidence from which the jury might have believed that appellant knew there was no money in the accounts, yet believed in spite of this that the checks would be paid when presented. The trial court did not err in rejecting the requested instruction. (See *People v. North* (1982) 131 Cal.App.3d 112, 117.)

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

³ The jury was instructed with CALCRIM No. 358, which stated in relevant part: "You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded." Appellant's interview at the police station was not recorded on video or audio tape.